

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:14-CR-00033-KJD-CWH

V.

ALBERT BENJAMIN CHEE

Defendant.

AMENDED ORDER

Before the Court is Defendant's Objection to Magistrate Judge's Decision Denying, in Part, Defendant's Motion for Issuance of Subpoenas (#63). Plaintiff filed a response in opposition (#73).

Background

Defendant is charged with one count of Sexual Contact with a Child under 12, pursuant to 18 U.S.C. §§ 1153(a), 2244(a)(5), 2244(c), 2246(3). The facts surrounding this case are straight forward. On December 2, 2013, Mr. Chee visited his sister, Juanita Bark, at her residence. Ms. Bark has two minor daughters, S.B. and M.B. Ms. Bark sent her daughters to bed while Mr. Chee was there. At some point during the visit, Mr. Chee stated he would go to the restroom. Ms. Bark went to check to see if Mr. Chee was in the restroom but did not find him there. When Ms. Bark opened the door to her daughters' bedroom, she alleges Mr. Chee was lying down on the floor next to S.B.'s bed and that his hand was under S.B.'s blanket. Ms. Bark alleges that Mr. Chee was touching S.B.'s vaginal area. Ms. Bark also alleges when she opened the door to her daughters' bedroom M.B. was watching Mr. Chee and S.B.

According to Defendant's belief, Ms. Bark's ex-husband, the biological father of S.B. and M.B., allegedly molested her daughters. Ms. Bark reported this incident to the authorities, prompting law enforcement to investigate the father for sexual abuse months before the incident at issue in this

1 case took place. Defendant also believes Ms. Bark has been molested. Defendant believes that Ms.
2 Bark has had psychological problems and that she has had psychological break-downs in the past that
3 resulted in her leaving her house for weeks at a time. As a result, Defendant intends to focus his
4 defense on how the combination of these factors calls into question whether Ms. Bark truly saw what
5 she claims to have seen, or whether the combination of the factors outlined above made Ms. Bark
6 extremely suggestible to perceiving something that did not take place.

7 Accordingly, Defendant filed a motion (#51) requesting that the Magistrate Judge issue
8 subpoenas to Ms. Bark's identified medical treatment providers instructing them to provide defense
9 counsel with Ms. Bark's medical and mental health records. Plaintiff responded (#57), arguing the
10 motion should be denied because the records are privileged, and Defendant has not shown the
11 relevancy, admissibility, and specificity of the documents sought.

12 In reply (#59), Defendant explained Ms. Bark's medical and mental health records are
13 relevant to showing whether it is more likely than not that Ms. Bark perceived what she claims to
14 have perceived on December 2, 2013. Defendant further explained the records are admissible as
15 impeachment information relating directly to Ms. Bark's credibility, and, to ameliorate the specificity
16 concerns in the original subpoena request, Defendant limited the time frame to December 2011 to
17 present in an additional request (#59).

18 The Magistrate Judge held a hearing on the motion (#60) on November 30, 2015. At the
19 hearing, defense counsel clarified the medical and mental health records sought would be those
20 reflecting any diagnosis or treatment indicating Ms. Bark's ability to perceive was impaired. Defense
21 counsel emphasized Ms. Bark's medical treatment records were integral to Defendant's case because
22 Ms. Bark is the only witness accusing Defendant of touching S.B. inappropriately, and thus the only
23 witness at trial that will offer any testimony that he committed the act for which he is charged. Thus,
24 any medical issue Ms. Bark was diagnosed with or medication she was taking that would interfere
25 with her ability to perceive the incident in this case could bear on her credibility. The Magistrate
26 Judge held that the records were privileged, and denied Mr. Chee's subpoena request. (#60).

1 This Court withheld a determination on Defendant's objection due to subsequently scheduled
2 hearings on motions containing the same issue. Plaintiff filed an additional Emergency Motion for
3 Issuance of Subpoenas (#70) requesting, again, Ms. Bark's medical and mental health records. The
4 Magistrate held a hearing on this motion (#83), among others, and granted the motion subject to an in
5 camera review of Ms. Bark's records. Although the Magistrate's ruling on Plaintiff's subsequent
6 motion addresses the issue within the present motion, the Court will nonetheless address the merits
7 of Defendant's objection.

8 **Standard of review**

9 The trial court reviews a motion to reconsider a magistrate judge's ruling under the "clearly
10 erroneous or contrary to law" standard set forth in 28 U.S.C. §636(b)(1)(A). A factual finding is
11 "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire
12 evidence is left with the definite and firm conviction that a mistake has been committed. United
13 States v. Hinkson, 585 F.3d 1247, 1260 (9th Cir.2009) (en banc) (quoting United States v. U.S.
14 Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). See also United States v.
15 Ruiz Gaxiola, 623 F.3d 684, 693 (9th Cir. 2010). Though Section 636 (b)(1)(A) has been
16 interpreted to permit *de novo* review of the legal findings of a magistrate judge, magistrate judges are
17 given broad discretion on discovery matters and should not be overruled absent a showing of clear
18 abuse of discretion. Anderson v. Equifax Info. Services LLC, 2007 WL 2412249, at *1 (D.Or.2007).

19 **Analysis**

20 The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the
21 accused shall enjoy the right to ... be confronted with the witnesses against him [and to] have
22 compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI.

23 With respect to evidentiary privileges, "the privilege of a witness, person, government, State,
24 or political subdivision thereof shall be governed by the principles of the common law as they may be
25 interpreted by the courts of the United States in the light of reason and experience," except as
26 otherwise provided. FED.R.EVID. 501. Although the Supreme Court created a federal

1 psychotherapist-patient privilege that covers confidential communications made to licensed
2 psychiatrists, psychologists, and social workers, the Ninth Circuit has not ruled on whether
3 psychotherapist records should be disclosed when a defendant's right to a fair trial, including the
4 right to confrontation, is implicated.

5 Various courts have dealt with this issue and have held that the defendant should be entitled
6 to these privileged records when the records are integral to the defendant's ability to prepare and
7 present a defense. Other courts have held the opposite.

8 A. The Psychotherapist-Patient Privilege

9 The psychotherapist-patient privilege is first recognized in Jaffee v. Redmond, 518 U.S. 1
10 (1996) wherein the United States Supreme Court solidified the privacy rights of individuals in
11 protecting the confidentiality of their mental health records from discovery. The court in Jaffe
12 examined FED.R.EVID. 501 which authorizes federal courts to define new privileges by interpreting
13 common law principles in the light of reason and experience. While recognizing that a trial is a
14 search for the truth, the court in Jaffe acknowledged that public policy may require certain
15 exemptions and exceptions to admissibility of evidence. Courts have differed as to whether, and
16 which, statutory or evidentiary privileges can be subordinate to rights under the Sixth Amendment.

17 In Pennsylvania v. Ritchie, a criminal case predating Jaffe, the defendant was convicted on
18 various counts related to his molestation of his daughter. Prior to his trial, the defendant subpoenaed
19 Children and Youth Services ("CYS"), a protective service agency established by Pennsylvania to
20 investigate cases of suspected child mistreatment and neglect, for certain records relevant to his case.
21 He argued that the records might contain the names of favorable witnesses and other, unspecified,
22 exculpatory evidence. CYS refused to comply with the subpoena, stating that the records were
23 privileged under a state law which provided that all CYS records were confidential, with specified
24 exception. One of the exceptions was that CYS may disclose reports to a court of competent
25 jurisdiction pursuant to a court order. The Supreme Court made two findings applicable to the instant
26 case. First, the court held that since the legislature contemplated some use of CYS records in court,

1 there was no reason to believe that relevant information could not be disclosed when the appropriate
2 court determined that the information was “material” to the defendant’s defense. Therefore, it held
3 that the defendant was entitled to have the CYS file reviewed by the trial court to determine whether
4 it contained information that could have changed the outcome of his trial. Ritchie, 480 U.S. 39,
5 57–58 (1987). However, the court further held that the defendant’s right to discover exculpatory
6 evidence did not go so far as to include the unsupervised authority to search Pennsylvania’s files and
7 determine the materiality of the information. The court stated that the Pennsylvania Supreme Court
8 had incorrectly interpreted Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), “to
9 mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial,
10 for the protected information that might be used at trial to impeach or otherwise undermine a witness’
11 testimony.” Id. at 52. The court disagreed, stating that

12 The right to confrontation is a trial right, designed to prevent improper restrictions on
13 the types of questions that defense counsel may ask during cross-examination....The
14 ability to question adverse witnesses, however, does not include the power to require
15 the pretrial disclosure of any and all information that might be useful in contradicting
16 unfavorable testimony. Normally the right to confront one’s accusers is satisfied if
17 defense counsel receives wide latitude at trial to question witnesses....In short, the
18 Confrontation Clause only guarantees an *opportunity* for effective cross-examination,
19 not cross-examination that is effective in whatever way, and to whatever extent, the
20 defense might wish.

21 Id. at 52–53 (internal citations and quotations omitted; emphasis in original).

22 Since Jaffee, courts have differed on whether the Sixth Amendment can trump the
23 psychotherapist-patient privilege. In United States v. Doyle, the defendant argued that his Sixth
24 Amendment right to a compulsory process trumped the victim’s right to confidentiality. The
25 Government sought an upward sentencing departure due to the victim’s extreme psychological injury,
26 and the defendant argued that her psychotherapy records could perhaps dispel her testimony. The
court disagreed. It noted that other privileged communications are not subordinate to the Sixth
Amendment, and stated that Jaffe made clear that balancing tests are inappropriate. Moreover, the

1 court declined to conduct an in camera review of the records, noting that “[t]he court’s review of the
 2 files would itself be a breach of the privilege.” Doyle, 1 F.Supp.2d 1187 at 1189 (D.Oregon 1998).

3 Other cases have reached similar results. See, e.g., Johnson v. Norris, 537 F.3d 840, 845–47
 4 (8th Cir.2008) (rejecting an argument made by a state habeas petitioner that his rights under the
 5 Confrontation Clause were violated when the trial court denied him access to the psychiatric records
 6 of a witness; and also rejecting an argument that production of psychotherapy records not in the
 7 government’s possession was required under Brady v. Maryland); Newton v. Kemna, 354 F.3d 776,
 8 779–82 (8th Cir.2004); Petersen v. United States, 352 F.Supp.2d 1016, 1023–24 (D.S.D.2005)
 9 (rejecting an argument that the psychotherapist-patient privilege is secondary to a defendant’s rights;
 10 made in the context of an ineffective assistance of counsel claim made under 28 U.S.C. § 2255);
 11 United States v. Haworth, 168 F.R.D. 660, 660–62 (D.N.M.1996) (concluding that the psychotherapy
 12 records were privileged after in camera review and not subject to discovery, and stating that the
 13 defendants “mistakenly equate their confrontation rights with a right to discover information that is
 14 clearly privileged.”).

15 However, other courts have reached a contrary conclusion on this issue. See e.g., Bassine v.
 16 Hill, 450 F.Supp.2d 1182, 1185–86 (D.Oregon 2006) (distinguishing Jaffee as a civil case, and
 17 holding that the habeas petitioner’s rights of confrontation, cross-examination, and due process
 18 outweighed the psychotherapist-patient privilege); United States v. Mazzola, 217 F.R.D. 84, 88
 19 (D.Mass.2003) (holding that the societal interest in guarding the confidentiality of communications
 20 between a therapist and client were outweighed by a criminal defendant’s constitutional right to
 21 effectively prepare and cross examine a witness); United States v. Alperin, 128 F.Supp.2d 1251, 1253
 22 (N.D.Cal.2001); United States v. Hansen, 955 F.Supp. 1225, 1226 (D.Mont.1997) (finding that the
 23 defendant’s need for the privileged material outweighed the interests of the deceased victim and the
 24 public in preventing disclosure).

25 Jaffee does not discuss how the privilege is to be applied when a criminal defendant’s
 26 constitutional rights are implicated. United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal.

1 2001). Jaffe left the lower courts with the task of reconciling this privilege with the constitutional
 2 rights of a criminal accused, noting that there are situations in which the privilege must give way, for
 3 example, if a serious threat of harm to the patient or to others can be averted only by means of a
 4 disclosure by the therapist. Other courts have altogether refused to recognize the privilege as
 5 precedent in the context of a criminal proceeding. In these pre and post-Jaffe cases, to which
 6 Defendant refers, it has been held that “[b]road-brushed assertions of the societal interest in
 7 protecting the confidentiality of such information cannot justify the denial of these defendants’ right
 8 to examine and use this psychiatric information to attack the credibility of a key government
 9 witness.” United States v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1983). According to the
 10 Lindstrom court, “[a] desire to spare a witness embarrassment which disclosure of medical records
 11 might entail is insufficient justification for withholding such records from criminal defendants on
 12 trial for their liberty.” Id.

13 B. Balancing Test

14 Defendant correctly notes that the disparate treatment of these types of cases amongst federal
 15 courts necessitates a case-by-case balancing of the asserted privilege against the accused’s
 16 constitutional rights. In Society of Independent Gasoline Marketers, 624 F.2d 461 (4th Cir. 1979),
 17 cert. denied, 449 U.S. 1078 (1981), the Fourth Circuit explicated a process to determine whether it
 18 should disclose to the defense a report about the mental health of a chief government witness. The
 19 court stated:

20 If the report contains only material impeaching the witness, disclosure is required only
 21 when there is a reasonable likelihood of affecting the trier of the fact. Whether there is
 22 such a likelihood depends upon a number of factors such as the importance of the
 23 witness to the government’s case, the extent to which the witness has already been
 24 impeached, and the significance of the new impeaching material on the witness’
 25 credibility. 624 F.2d at 469 (quoting United States v. Figurski, 545 F.2d 389, 391-92
 26 (4th Cir. 1976)).

27 More specifically, according to the court in Lora v. Board of Educ., 74 F.R.D. 565, 579
 28 (E.D.N.Y. 1977), courts can achieve the proper balance among the competing interests and determine
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1 the amount and type of information that should be disclosed through consideration of the following
2 questions:

- 3 [1] Is the identification of the individuals required for effective use of the data?
4 [2] Is the invasion of privacy and risk of psychological harm being limited to the
narrowest possible extent?
5 [3] Will the data be supplied only to qualified personnel under strict controls over
confidenceality?
6 [4] Is the data necessary or simply desirable?

7 The Lora court did not explain how it developed these four questions, however, the court's analysis
8 provides a formal framework for the balancing methods used by other federal courts to determine the
scope of the psychotherapist-patient privilege.

9 For example, in United States v. Brown, 479 F. Supp. 1247, 1253 (D. Md. 1979), wherein the
10 defendant moved for a new trial following a conviction for giving false testimony before a grand jury,
11 defense counsel wanted to question the key prosecution witness about her mental and emotional
12 history and requested the trial court to subpoena her mental hospital records. The witness claimed
13 that the psychotherapist-patient privilege prohibited the defense from acquiring these files. As a
14 result, the court took "scrupulous measures" to insure that the subpoenaed mental hospital records
15 concerning the government's chief witness were not disclosed frivolously during any of the pretrial
16 hearings or at trial. The court held in camera hearings and sealed the transcripts of the proceedings.
17 The court, the witness, and the witness' attorney reviewed the hospital records. The court then
18 decided that the psychiatric records contained nothing relating to the charges against the defendant,
19 the government's prosecution of the defendant, or to the defendant's relationship with the witness.
20 Because the records were not sufficiently relevant or material to any issues, including those of
21 credibility and reliability, the defense could not examine the records or use them at trial. Utilizing
22 the available balancing criteria, the court decided that the psychiatric records were not necessary for
23 determination of any of the issues at trial.

24 By prohibiting disclosure of all of the requested information, the court did not have to
25 consider how much information was necessary for (1) effective use of the data. The court limited (2)
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1 the invasion of privacy and risk of psychological harm to the narrowest possible extent by holding in
2 camera hearings and by sealing the transcripts of the proceedings. Also, (3) only the court, the
3 witness, and the witness' attorney examined the psychiatric records, thus establishing that the
4 requested information was (4) not necessary. The four-part balancing analysis allows courts to
5 evaluate the interests of the parties to a proceeding and provides courts with a framework for
6 deciding how much and what type of the requested information a party may receive.

7 C. Exceptions to the Psychotherapist-Patient Privilege

8 In addition to considering the balancing criteria that define the scope of the psychotherapist-
9 patient privilege in each case, a court must examine three specific exceptions to the privilege: (1)
10 communications that the patient made with the expectation that they would be disclosed to third
11 parties; (2) communications made pursuant to a judge-ordered mental examination of the patient; and
12 (3) communications concerning a mental condition that the patient raises in court as an element of the
13 patient's defense. See, e.g., In re Zuniga, 714 F.2d 632, 640-41 (6th Cir. 1983) (holding that the
14 psychotherapist-patient privilege "interests, in general, outweigh the need for evidence in the
15 administration of criminal justice."); In re Pebsworth, 705 F.2d 261, 263-64 (7th Cir. 1983) (finding
16 waiver of privilege for disclosure of treatment to third-party: "In assenting to disclosure of these
17 documents, a reasonable patient would no doubt be aware that routine processing of reimbursement
18 claims would require these records to be brought into the hands of numerous anonymous employees
19 within a large corporation. While we might well have decided differently if the information sought
20 under the subpoena involved detailed psychological profiles of patients or substantive accounts of
21 therapy sessions, it cannot be said that the subsequent disclosure of such fragmentary data as is
22 involved here as part of the insurance company's legal duties in assisting a federal criminal
23 investigation would be beyond the contemplation of the patients' waiver."); U.S. v. Meagher, 531
24 F.2d 752, 753 (5th Cir. 1976) (defendant raising own mental state as element of defense); U.S. v.
25 Harper, 450 F.2d 1032, 1034 (5th Cir. 1971) (court-ordered examination); Ramer v. U.S., 411 F.2d
26 30, 39-41 (9th Cir. 1969) (court-ordered examination); U.S. v. Layton, 90 F.R.D. 520, 522 (N.D. Cal.

1 1981) (defendant raising own mental state as element of defense); See also, In re Doe, 964 F.2d 1325,
2 1329 (2d Cir. 1992) (holding that “the privilege amounts only to a requirement that a court give
3 consideration to a witness’s privacy interests as an important factor to be weighed in the balance in
4 considering the admissibility of psychiatric histories or diagnoses”).

5 No exceptions to the privilege are present in this case. While FED.R.CRIM.P. 17(c) governs
6 all trial subpoenas duces tecum, the Ninth Circuit instructs that a “Rule 17(c) subpoena is not
7 intended to serve as a discovery tool.” U.S. v. MacKey, 647 F.2d 898, 901 (9th Cir. 1981); see e.g.
8 United States v. Haworth, 168 F.R.D. 660 (D.N.M. 1996) (Wherein the defendants argued that the
9 confrontation clause overcame the psychotherapist-patient privilege and that they were therefore
10 constitutionally entitled to discover the records of a government witness’s psychotherapist. The court
11 easily rejected the argument, citing precedent establishing that while the right to confrontation may
12 permit the defendant to employ information on cross-examination, it does not translate into a
13 discovery right).

14 Since no exceptions to the physician-patient privilege are present in this case, the Court
15 balances defendant’s interest in receiving a fair trial, including the opportunity to conduct a full
16 cross-examination and to impeach Ms. Bark, against the need to spare Ms. Bark from “unnecessary
17 invasion of privacy as well as to spare her from harassment, annoyance or humiliation.” United States
18 v. Brown, 479 F. Supp. 1247 (D. Md. 1979). Defendant’s amended subpoenas filed with their
19 Objection, seek “diagnoses and prescribed medication for [Ms. Bark] from December 2011 to
20 present.” (#63 Ex.1). Here, Defendant has failed to “establish with sufficient specificity the
21 evidentiary nature of the materials” requested as there appears to be mere speculation as to what her
22 records contain. United States v. Hardy, 224 F. 3d 752, 755-756 (8th Cir. 2000) (rejecting a
23 defendant’s claim that materials would contain impeachment material, noting that although the
24 defendant stated why he wanted the requested materials, he “[could not] set forth what those
25 materials contain.”) The Court also notes the relevance of the request to Defendant’s case and
26 accordingly adopts an approach similar to that of the court in Brown. Therefore, the Court finds that

1 the facts of this case necessitate an in camera review of Ms. Bark's psychotherapy records,
2 specifically regarding her diagnoses and prescribed medication from December 2011 to present.

3 **Conclusion**

4 Accordingly, **IT IS SO ORDERED** that Defendant's Objections to the Magistrate's Decision
5 Denying in Part Defendant's Motion for Issuance of Subpoenas (#63) is **GRANTED**.

6 **IT IS FURTHER ORDERED** that by June 20, 2016, the Las Vegas Paiute Tribe Health and
7 Human Services shall provide, directly to the Court for in camera review, the requested documents
8 pertaining to Ms. Bark's psychotherapy records. The documents shall be organized in a manner
9 responsive to the request.

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12 Dated this 14th day of June 2016.

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Kent J. Dawson
United States District Judge